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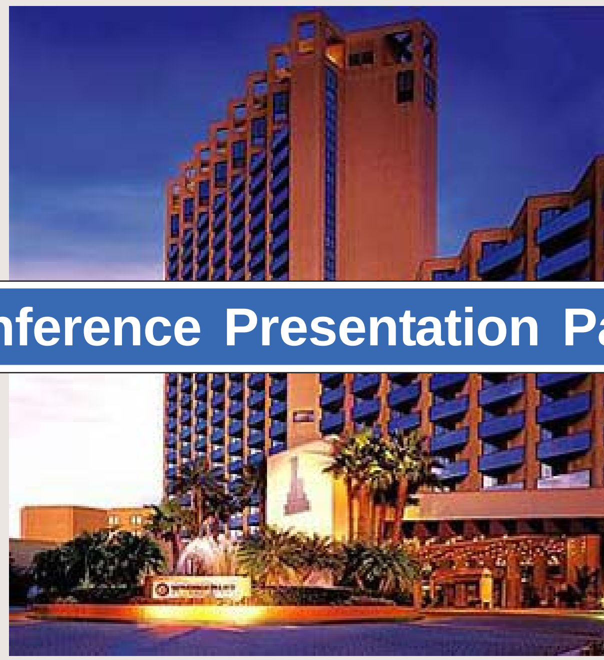

Conference Presentation Paper

Uncharitable Creditors:
The Collision of Charitable and Asset Protection Planning

Presented by

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I. ASSET PROTECTION IN TUMULTUOUS TIMES

"Creditors have better memories than debtors."[1]

Many advisors and presumably all donors and other clients prefer to discuss how to minimize tax burdens, provide for family members and other beneficiaries, and even benefit charitable organizations in numerous cases. These days, it seems that nearly every client just wants to focus on whether enough assets remain to survive during his or her projected life expectancy! While the favorite topics of death and taxes are certain to return, especially around the mid-term elections of November 2010, more advisors will through the end of 2010 -- and well beyond -- likely encounter questions regarding asset preservation and protection or perhaps less optimistic issues surrounding short-sales, deeds in lieu of foreclosure, and bankruptcy.

What happened to the 1990s or even the first years of the new millennium?! The United States seemed to recover relatively quickly from the tragedy of September 11, 2001. In contrast, the "Great Recession," as some have dubbed the staggering declines of the real estate and stock markets beginning in 2008 (give or take a few hundred billion), has done far more economic damage.[2] Now most planned giving articles focus on dramatic declines in charitable giving or the cost-cutting efforts of various charities hoping to endure these challenging conditions.

Such a downturn can teach important lessons. Some have hypothesized that the Great Recession has led to an increase in attendance at churches, synagogues, and other houses of worship.[3] For those involved in that corner of the philanthropic sector, perhaps this is good news?! I would offer an alternative lesson, however, that serves as the topic of my presentation to the 2010 National Conference on Philanthropic Planning: Whether you are a donor or a charity (or a professional advisor of either), you should evaluate and mitigate your risk exposure, including consideration of various planning techniques that can enhance the protection of your assets and income.[4] In short, protect your "back side" -- preferably long before you find it to be the target of creditors who might not remember their own mistakes, such as their own poor financial judgment, but they remember yours as well as the exact balance of your obligation(s)!

A. Religious Organizations Reeling -- Example of Charity's Financial and Other Legal Exposure to Claims

As a person who highly values faith, please know that the last thing that I want to do is pick on religious organizations! In this context of potential creditors' claims and planning to protect against such claims to the greatest degree possible, though, churches and religious organizations have frequently faced these issues in recent times and prior to the Great Recession.

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[1] BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC (1758).
[2] For an interesting overview, see Wikipedia's "Financial crisis of 2007–2010," *available at* http://en.wikipedia.org/wiki/Financial_crisis_of_2007–2010. (Note that Wikipedia articles are based on user contributions and might contain biased and/or inaccurate information, but are sometimes helpful to gain a general perspective on a topic.)
[3] On balance, the Pew Research Center has concluded that no such phenomenon is occurring. *See* Pew Research Center, *Is a Bad Economy Good for Church Attendance?* (Mar. 12, 2009), *available at* http://pewforum.org/Religious-Attendance/Is-a-Bad-Economy-Good-for-Church-Attendance.aspx.
[4] References throughout this presentation to the protection of "assets" generally encompass both assets and income.

Historically, charitable organizations of all varieties enjoyed the same types of protection afforded governmental entities, including the period known as the Great Depression of the 1930s. In other words, charities were generally immune from most claims of creditors.

Charitable immunity was recognized in England via case law in the mid-nineteenth century.[5] Across the Atlantic, charitable immunity was specifically adopted in a Massachusetts case decided in 1876.[6] Various public policies have been ascribed to the legal underpinnings of charitable immunity, from a trust law concept of the charity holding funds as a "public trust" for the benefit of others (to protect the intent of the donor's charitable gift and the viability of the charity) to the general public policy notion that charities are considered quasi-governmental entities for tax purposes and should therefore be treated as such for immunity purposes as well.[7] Regardless of the legal and policy rationale, charitable immunity existed in all jurisdictions of the United States for decades.

Then came the 1942 case involving Georgetown University (then Georgetown College).[8] Since that time, many states have changed -- typically through legislative efforts -- charitable immunity, either by limiting it or altogether abolishing it. In fact, at least thirty-six states no longer recognize the doctrine of charitable immunity.[9] A few states, however, have retained charitable immunity, including the Commonwealth of Massachusetts.

In 2002, the Catholic Archdiocese of Boston was rocked with revelations of numerous alleged accounts of sexual abuse committed by its priests. As identified by Dr. Catharine Pierce Wells, Professor of Law at Boston College, the scope of this scandal could have bankrupted the Archdiocese of Boston (and theoretically the Roman Catholic Church), depending on the extent of damages and the ascription of liability.[10] Dr. Wells has aptly described the important roles that charities, including churches and religious organizations, play in American culture and society.[11] She also advocated that Massachusetts' unique charitable cap on tort liability damages should apply to the cases involving the Archdiocese of Boston.[12]

In most states, however, there is no such limitation on the tort liability of charities under modern law. Charities face the same types of risk exposure that their donors and their for-profit counterparts encounter. The sorrowful situation in Massachusetts illustrates that charities of all varieties must assess their risk exposure much like donors do. We all must wrestle with economic risks, with charities sadly suffering some of the worst consequences of the Great

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[5] *See Holliday v. St. Leonard, Shoreditch*, 142 Eng. Rep. 769 (1861) (discussed in *Collopy v. Newark Eye & Ear Infirmary*, 141 A.2d 276, 283 (N.J. 1958)).
[6] *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432, 436 (1876) ("[Massachusetts General Hospital] has no funds which can be charged with any judgment which [plaintiff McDonald] might recover, except those which are held subject to the trust of maintaining the hospital.").
[7] *See generally* Stephen J. Riccardulli *et al.*, *Tort Liability of Religious Organizations*, American Bar Association General Practice, Solo & Small Firm Division Law Trends & News (Summer 2009), *available at* http://www.abanet.org/genpractice/newsletter/lawtrends/09_summer/litigation_runquist.html.
[8] *Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).
[9] *See* RESTATEMENT (SECOND) OF TORTS § 895E (2008) (including citations).
[10] Catherine Pierce Wells, *Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy*, 44 B.C. L. REV. 1201, 1202-1203 (2003).
[11] *See id.* at 1204-1209.
[12] *Id.* at 1224-1226.

Recession. Nevertheless, there are abundant other risks that might jeopardize a charity's existence or a donor's solvency.

B. Basic Asset Protection

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> CREDITOR, n. One of a tribe of savages dwelling beyond the Financial Straits and dreaded for their desolating incursions.
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> LAWYER, n. One skilled in circumvention of the law.
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> ***[13]

With all sincerity, donors and charities must decide whether and to what extent they need or want to protect their assets from the claims of potential creditors. Specialized lawyers (usually trust and estate and/or tax lawyers) typically design or are at least involved in the implementation of that protective planning. Worthwhile asset protection planning does not resemble "The Firm," the blockbuster movie based on one of the well-known John Grisham novels. In recent years, significant legal scholarship has suggested that ignoring legitimate asset protection, such as during the "traditional" estate planning matter the discussions of which center on tax-oriented wills and trusts, potentially rises to the level of malpractice. In the past, a number of estate planning (or "trust and estate") lawyers opted not to include asset protection in their practices.[14] That approach is no longer as prevalent as it once was.

In my view, asset protection is merely another more advanced aspect of estate planning, much like charitable planning and organizations law. Indeed, asset protection intersects with basic and advanced tax planning on many levels. One of the most fundamental principles of tax planning, namely that one may within the bounds of the law arrange his or her affairs so as to minimize tax exposure (to paraphrase part of Justice Learned Hand's holding below in a famous tax case), applies analogously to asset protection planning. Justice Learned Hand's actual statement rings true regarding asset protection as well, which you may see by substituting "risks" or "exposure to creditors' claims" in place of "taxes" below:

> Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes. Over and over again the Courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible. Everyone does

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[13] AMBROSE BIERCE, THE DEVIL'S DICTIONARY (1911), *available at* http://www.gutenberg.org/files/972/972.txt.

[14] Ironically, Anglo-American trust law was likely founded on asset protection planning, dating to the Crusades. *See generally* Robert Whitman, *Resolution Procedures to Resolve Trust Beneficiary Complaints*, 39 REAL PROP., PROB. & TR. J. 829, 841-850 (2005) (citing, among numerous other references, Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 TUL. L. REV. 1139 (1996)).

> it, rich and poor alike and all do right, for nobody owes any public duty to pay more than the law demands: Taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.[15]

Another guiding principle of estate and tax planning applies equally to the general approach of asset protection: You must often give up at least direct (or "legal") control in order to avail yourself of the benefits of a particular planning technique. As discussed below, some jurisdictions offer far more "default" protections than others. In those contexts, donors and conceivably charities might not need to plan as extensively in order to protect their assets. On the other hand, most situations require at least some degree of additional planning beyond a particular state's exemptions from creditors' claims in order to achieve a significant degree of protection.

A third and final general principle of estate and tax planning should also inform anyone's asset protection planning, including protecting within the charitable context: As one of my favorite tax professors would say during law school, "Pigs go to market, and hogs get slaughtered." He undoubtedly received that wisdom from other sources. This concept applies particularly well in the area of asset protection. If the planning is so complex or intricate that a judge could not make clear sense of it, you might want to reconsider and simplify (or altogether abandon) it! Prudent planning requires following substantive laws and ethical rules, but also typically necessitates the type of conservative approach that you would use if advising your own parents or other loved ones. Aggressive asset protection planning will often lead to an aggressive response either by the creditor(s) or by the judge presiding over the case.

A comprehensive discussion of asset protection is well beyond the scope of this presentation. Numerous resources exist to assist you with that research.[16] This presentation will focus on asset protection in the charitable arena, however, on which there is a dearth of scholarship. I will also use the Sunshine State of Florida as an example of how these rules apply, which seems appropriate considering that this conference is being held in Orlando.[17]

C. Protections Available in Florida

Florida is known as a "domestic tax haven" or "onshore tax haven" among several colleagues who practice asset protection law and others as well.[18] Those titles are well deserved based on Florida's statutory and judicial protections. Beyond Florida's tax benefits, you must

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[15] *Gregory v. Helvering*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935). Indeed, the United States Treasury is generally considered a "super-creditor" in its assessment and collection of taxes.

[16] *See, e.g.*, ASSET PROTECTION STRATEGIES vols. I-II (Alexander A. Bove, Jr., ed., 2005) (published by the American Bar Association's Section of Real Property, Trust and Estate Law).

[17] Tennessee, which is near and dear to my heart as well and was the original site of this conference until the tragic flooding in Nashville forced a change of venue, also offers relatively strong protections and is compared to Florida and two other southeastern jurisdictions in the attached chart that I have prepared over the past few years. In addition, the Florida Statutes are available online (for the years 1997 - 2010, all navigable via hyperlinks), which allows you to view any of those citations easily if interested: http://www.flsenate.gov/statutes/.

[18] Caitlin Liu, *Domestic Tax Havens*, Portfolio.com (Mar. 31 2008), available at http://www.portfolio.com/resources/business-intelligence/2008/03/31/Domestic-Tax-Havens.

cover your bases as a creditor, or else you might find yourself with no target at which to shoot your claims (or at least nothing from which to collect any resulting judgments).

Chapter 222 of the Florida Statutes contains most of Florida's exemptions from creditors' claims. My attached chart/matrix comparing Florida to the other states from which our clients frequently migrate illustrates the most important exemptions.[19] These exemptions include homestead (which is further protected by the Florida Constitution and an entire body of case law), wages, life insurance and annuities (including both the cash value and the death benefits/proceeds), pension and other retirement accounts and plans, and qualified tuition plans and more.[20]

These exemptions generally apply not only in state law matters and cases, but also in the bankruptcy context and after someone dies (through probate). Even a general discussion of bankruptcy law is beyond this presentation's pale. The simple summary is that Florida has opted out of the federal bankruptcy exemptions,[21] meaning that Florida's extensive state law exemptions typically apply in bankruptcy cases. This is similar to state law dictating how federal tax law applies to a particular property issue or right.[22]

Florida is also one of a few states that still recognizes the form of property ownership known as a tenancy by the entirety (TBE).[23] Essentially TBE is like a joint tenancy with rights of survivorship but reserved only for married couples. Unlike other TBE states, such as Tennessee, Florida offers a "full bar," meaning that this type of property is exempt from either spouse's creditors' claims.[24] Florida's TBE exemption also includes both real and personal property.[25] Only a joint creditor of both spouses may arguably reach TBE property interests in Florida.[26]

As a result of these various exemptions, most Floridians have protected the vast majority of their assets either by being born here or by migrating here! These generous exemptions have definitely received the scorn of some legislators. For example, the extensive 2005 bankruptcy reform act[27] purported to restrict the complete exemption of Florida homestead real property where a debtor had owned that primary residence for less than 1,215 days prior to filing his or her bankruptcy petition. Regardless of your perspective, some commentators have opined that this provision resulted from O.J. Simpson's very public migration to Florida from California, which generally allowed him to minimize (or eliminate) his exposure to civil lawsuits and judgments via Florida's exemptions, including what was then an immediate, unlimited

[19] I would welcome comments and especially corrections from any colleagues in the other states listed.
[20] *See generally* ASSET PROTECTION IN FLORIDA (2008) (published by The Florida Bar).
[21] FLA. STAT. § 222.20 (2010).
[22] *See Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).
[23] *See generally* Fred Franke, *Asset Protection and Tenancy by the Entirety*, 34 ACTEC J. 210 (2009) (also generally explaining the use of state law exemptions in bankruptcy).
[24] *Id.* at 219-221, 223-224.
[25] *Id.* at 223-224.
[26] *See generally* Steven B. Chaneles, *Tenancy by the Entireties: Has the Bankruptcy Court Found a Chink in the Armor?*, 71 Fla. Bar. J. 22 (Feb. 1997) (citing *In re: Planas*, 199 B.R. 211 (Bankr. S.D. Fla. 1996), *rev'd in part*, 1998 WL 757988 (S.D. Fla. Aug 21, 1998)), *available at* http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Articles/080FC770570274C485256ADB005D60FD.
[27] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. 109-8, 119 Stat. 23.

homestead exemption in bankruptcy, which is significantly different from California law based on my general understanding.

In any event, some situations require additional planning because not all assets fall within one of Florida's exemption categories. Consequently, the client and his or her advisors must consider additional planning measures to enhance the protection of one or more exposed assets. These additional techniques often demand the use of one or more trusts, one or more business entities, or a combination of those structures and sometimes a variety of transactions in order to accomplish the transfer of those exposed assets to a "protected vehicle." Because these rules, especially concerning any transfers, can become rather complex, caution is certainly advisable. The primary obstacles to these transfers are the fraudulent transfer and conversion rules, which are discussed below (near the end of the presentation).

D. Other Estate Planning Options Where Exposed Assets Remain: Business Entities and Spendthrift Trusts

Two common estate planning tools represent two of the most used asset protection techniques as well: the family limited partnership (FLP) (or family limited liability company (FLLC)) and the irrevocable discretionary spendthrift trust. First, an FLP represents a viable way to accomplish many estate planning goals, including consolidation of assets, diversification of investment, potential (reasonable) valuation discounts, and the like. These business entities also offer significant asset protection.

Florida is one of several advantageous jurisdictions that restricts a creditor's access to a debtor's ownership interest in an FLP to what is called a "charging order."[28] So long as the business entity has been respected for legal purposes, a creditor typically cannot successfully file or pursue a claim against the entity. That leaves only the debtor. Nevertheless, if a creditor is only entitled under state law to a charging order against the debtor's partnership distributions, the creditor cannot compel the business entity to do anything, including distribution of assets or income, and is only entitled to the creditor's percentage of any actual distribution to the debtor.

Creditors obviously do not like this result, which is usually why lenders and other creditors discourage the use of these business entities. They often want personal guarantees, which basically give access to other assets outside of the business entity. Of course, if all of those assets are well protected, that guarantee is relatively benign.

Despite the appeal of an FLP, this planning can conceivably result in a "stand-off." For example, if Bodacious Big Bank, N.A. obtains a charging order against me, the other partners cannot make distributions to me without exposing those distributions to the creditor's charging order. While this situation might still enhance the negotiation strategy of a client, allowing a judgment to remain afloat for ten years (or twenty if renewed in Florida) might not be so attractive.

[28] FLA. STAT. § 620.1703(3) (2010). *See* ASSET PROTECTION STRATEGIES, *supra* n. 16, at ch. 8 (contributed by Mario Mata); Thomas O. Wells & Jordi Guso, *Asset Protection Proofing Your Limited Partnership or LLC for the Bankruptcy of a Partner or Member*, 81 Fla. Bar. J. 34 (Jan. 2007), available at http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Articles/ED13EBE49FC5089685257251004E2D41.

Enter the second additional technique: the irrevocable discretionary spendthrift trust. This trust's name hopefully explains its nature. Please allow me to translate if not. "Irrevocable" means what it says, although we can include numerous flexible provisions that make this type of trust anything but strictly irrevocable. For example, under Florida law, the client can appoint a trust advisor or "protector" to perform numerous tasks, including amendment or revocation of the trust. This figure has been used for years in international trusts, and is now much more common in domestic trusts as well. In the "worst-case" scenario, the trustee or a beneficiary of the trust may petition the court to modify the trust under many different circumstances.[29]

"Discretionary" means that the trustee is not required or compelled to make distributions of income or assets (or "corpus" or "principal"). Florida law allows the use of "ascertainable standard" distributions without compromising the integrity of this type of trust in terms of creditors' claims, including where the beneficiary is also the trustee of the trust.[30] The most conservative route is to leave distributions to the absolute, sole discretion of the trustee without any suggested distribution events or even ascertainable standard distributions. It is also wise in my estimate to include at least a co-trustee -- preferably an independent co-trustee -- although a beneficiary may serve as his or her own sole trustee without jeopardizing the trust under Florida law (as discussed above). My concern is that another state might become involved where this rule is different, among other factors.

"Spendthrift" means prohibition of any distribution or other "alienation" to satisfy a creditor's claim, in addition to protecting the beneficiary from himself or herself.[31] As other colleagues have described, the spendthrift provision protects a beneficiary from "creditors, predators, in-laws, outlaws, disabilities, and inabilities." Notably, you may not create one of these trusts in Florida to protect against your own creditors. Creditors may reach those so-called "self-settled" spendthrift trusts.[32]

A dozen jurisdictions in the United States[33] have deviated from this common law rule to allow what are generally known as "domestic asset protection trusts" (DAPTs), in part to

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[29] FLA. STAT. § 736.0410 *et seq.* (2010) (multiple judicial modification options and non-judicial as well).

[30] *Id.* at § 736.0504(3) (2010) (allowing "health, education, support, and maintenance" or "five percent or $5,000" distributions as qualifying ascertainable standard distributions: "If the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee").

[31] *Id.* at § 736.0502. *See generally* GEORGE G. & GEORGE T. BOGERT, (BOGERT ON) THE LAW OF TRUSTS AND TRUSTEES §§ 222-27 (rev. 2d ed. 1992) (Amy Morris Hess ed., Supp. 2010); Note, *Spendthrift Trusts*, 2 U. FLA. L. REV. 402 (1949).

[32] *Id.* at § 736.0505(1)(b); *Fehlhaber v. Fehlhaber*, 850 F.2d 1453 (11th Cir. 1988), *aff'd on reh'g*, 941 F.2d 1484 (1991). *Cf.* BOGERT, *supra* n. 25, at § 223 ("Settlor Creates Spendthrift Trust for Self"); AUSTIN W. SCOTT & WILLIAM F. FRATCHER, 2A THE LAW OF TRUSTS § 156 (4th ed. 1987); RESTATEMENT (SECOND) OF TRUSTS § 156 (1959) (spendthrift trusts created in whole or part for settlor's benefit).

[33] Those jurisdictions include, in order of the statutory enactment, Colorado (1861 -- though debated by experts as to whether it qualifies as a true DAPT statute), Delaware (1997), Alaska (1997), Rhode Island (1999), Nevada (1999), Utah (2003), Oklahoma (2004), Missouri (2005), South Dakota (2005), Wyoming (2007), Tennessee (2007), and New Hampshire (2009).

compete against international (sometimes affectionately known as "coconut") jurisdictions that have allowed these types of trusts for decades.[34] These dozen states specifically allow you to create a trust to protect against your own creditors. In brief summary, numerous commentators and practitioners have raised concerns about these DAPTs, the international counterparts of which are indeed valid because the United States Constitution does not apply. Nevertheless, in one of our states, the general concern is that a state that does not recognize the validity of this self-settled trust might issue a judgment that the DAPT state would generally be forced to honor under the Full Faith and Credit Clause of the United States Constitution.[35] This type of trust might still fit somewhere in a particular client's planning, but is probably not appropriate for most clients. For clients who are truly residents of a DAPT state and whose assets are physically located there, this newer option might work well in a wider array of scenarios.

To alleviate the "stand-off" predicament above, a client could transfer part or all of his or her FLP interests to a valid spendthrift trust.[36] Then the trust -- not the client -- would be the owner of the business entity. Therefore, distributions would flow to the protected trust and not to the exposed debtor-client directly, which should preclude the ability of that creditor to obtain a charging order unless the trust itself was the actual debtor. This type of hybrid structure is common in the international planning arena,[37] but can be used just as effectively (if not more so) here in the United States.

II. CHARITABLE SOLUTIONS WITH ASSET PROTECTION BENEFITS -- DONOR'S VIEW

After laying the foundation of asset protection planning principles, we turn now to the use of these principles in charitable gift planning. The first application involves a donor-client. Some donors might not be comfortable making a charitable gift due to the rather grim outlook, but might regain their interest if they may do so and also enhance the preservation and protection of their assets.

A. Outright Gifts

Outright gifts generally do not create potential creditor issues unless they run afoul of the fraudulent transfer and conversion rules (discussed below). On balance, they also inherently do

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[34] *See generally* JOHN R. PRICE & SAMUEL A. DONALDSON, PRICE ON CONTEMPORARY ESTATE PLANNING § 10.50 (2009), *available at* http://books.google.com/books?id=OONYE8-Y0YkC&lpg=SA10-PA147&ots=ZeFiz2v2Q4; Dan W. Holbrook, *When to TIST? Here's a List*, 43 Tenn. CPA J. 25-26 (Nov. 2007) (discussing Tennessee as tenth DAPT state), *available at* http://tba.org/Journal_TBArchives/200711/nov_2007.pdf; John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 CARDOZO L. REV. 2621 (2006), *available at* http://www.cardozolawreview.com/PastIssues/EASON.WEBSITE.PDF.

[35] *See, e.g.*, Thomas O. Wells, *Domestic Asset Protection Trusts -- A Viable Estate and Wealth Preservation Alternative*, 77 Fla. Bar. J. 44 (May 2003) (suggesting careful trustee selection to mitigate constitutional arguments), *available at* http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Articles/CE02251A3CDFD2CB85256D10006AC6C0; Karen E. Boxx, *Gray's Ghost -- A Conversation about the Onshore Trust*, 85 IOWA L. REV. 1195, 1227 (2000).

[36] *See* ASSET PROTECTION STRATEGIES, *supra* n. 16, at pp. 111-113 (under "Use of a Domestic Trust as Limited Partner").

[37] *See id.* at pp. 113-115 (under "Use of an Offshore Trust as Limited Partner").

not offer any residual benefit to the donor apart from any tax advantages and related benefits. Thus, outright gifts will be discussed a bit further below in the context of the charity's view.

B. Gift of Partial Interest in Personal Residence (Florida Homestead)

Moving to gifts of "partial interests," as we lawyers like to say, a client may truly give, receive, and protect the gift of a remainder interest in Florida homestead real property. For those who might be unfamiliar with this planning technique, the Internal Revenue Code and its Treasury Regulations allow a donor to make only certain "partial interest" gifts, where the donor gives part of a property interest to charity and retains part of it for the donor's continued use.[38] One of those permitted partial interest gifts is the remainder interest in a personal residence (or a farm), where the donor retains the right to use the residence for his or her life. Upon the donor's death, the residence (or "remainder") goes to the charity based on the legal effect of the deed used to create this arrangement.

Florida already protects the homestead, as discussed above. The donor may therefore transfer part or all of it without violating the fraudulent transfer rules (discussed below). Other factors must be considered, including whether the donor is married (joinder/waiver of spouse required if so), if any homestead real property tax benefits would be forfeited, and other relevant considerations. Even with those considerations, this is a fairly simple way to make a protected charitable gift that might make sense for an interested donor.

C. Garden Variety Charitable Gift Annuities Revisited … and Reinsured

Florida exempts a broad range of annuities under Section 222.14 of the Florida Statutes. Florida also protects both the annuitant (recipient of annuity payments) and the beneficiary (recipient of the life insurance feature, if any, paying death benefits to a designated beneficiary). Unlike several other states, Florida's annuity exemption does not require conditions such as the support of certain family members in order to apply this exemption.

Unfortunately, based on my research, there is no Florida case law specifically holding that charitable gift annuities (CGAs) qualify as exempt annuities under this statute. Given the broad interpretation of Florida courts as to whether an annuity is exempt, it seems likely that CGAs would also be covered. For example, in the case of *In re: Mart*[39], the bankruptcy court applied the annuity exemption to a private annuity, which the debtor's daughter as trustee of a trust issued in exchange for the transfer of approximately $350,000. Because CGAs are governed by Section 627.481 of the Florida Statutes and the Office of Insurance Regulation, they would presumably be viewed in the same manner as commercial annuities that are clearly exempt.

To avoid doubts, a donor and the charity might want to pursue a "reinsured" CGA. Friend and colleague Bryan Clontz, whom many of you probably know as well, wrote several excellent articles on this subject, at least two of which are available via the Planned Giving

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[38] I.R.C. § 170(f)(3)(B)(i) (2010); Treas. Reg. § 1.170A-7(b)(3) & -(4) (2010).
[39] *In re: Mart*, 88 B.R. 436 (Bankr. S.D. Fla. 1988)

Design Center (2006 and 2009 articles).[40] The concept is simple: The charity issues the CGA and then purchases a commercial annuity to reinsure its risk, which also "cashes" out the charity and the charity keeps the difference between the contributed asset(s) (or liquidated sale proceeds) and the purchase price of the commercial annuity.

During these times, reinsured CGAs might make sense not only for donors worried about the markets but also charities concerned about the same along with regulatory and related issues. Mr. Clontz's 2009 article notes two recent Private Letter Rulings that clarified some of the nuance issues involved in these situations.[41] As he noted in this latter article, reinsured CGAs are not universally applicable. When used to address one of several situations that he outlined, they can provide excellent solutions for all involved, including stronger exemption classification.

D. Charitable Remainder and Lead Trusts

For better or worse, the asset protection features of a charitable trust are remarkably similar to those outlined above for spendthrift trusts. Moreover, if you create the irrevocable spendthrift trust (unless you reside in and/or use one of the DAPT jurisdictions, revisited below within the charitable trust context), your creditors can generally reach the assets and any stream of payments. If someone else establishes that spendthrift trust, on the other hand, it might offer partial or complete protection.

Along with the lack of extensive scholarship on these issues, there is only one Florida case that addresses these specific situations. The case of *In re: Brown*[42] involved an unfortunate debtor who inherited approximately $250,000 from her mother in 1993. Because she knew her substance abuse struggles, she opted to create a charitable remainder unitrust (CRUT) to protect her inheritance from herself and her creditors. She later filed bankruptcy in 1999 and listed the CRUT as exempt. The Eleventh Circuit Court of Appeals ultimately decided against her, although the court held that the assets of the trust were exempt because the self-settled spendthrift trust rule did not apply as to that portion of the trust (which was indeed for charity's benefit and not Ms. Brown's own benefit).

While the case would have been more interesting had Ms. Brown created a charitable remainder annuity trust (CRAT), which might have qualified her interest under Florida's annuity exemption, the outcome probably would have remained consistent. Charitable remainder trusts where the donor retains a stream of payments would generally always be classified as self-settled spendthrift trusts. A reinsured CRAT might work,[43] but I doubt that anyone would want to serve as the test case conclusively to determine that!

[40] Bryan K. Clontz, *Charitable Gift Annuity Reinsurance Part II: The Top 10 Creative Solutions for Turbulent Times* (Feb. 16, 2009), *available at* http://www.pgdc.com/pgdc/charitable-gift-annuity-reinsurance-part-ii-the-top-10-creative-solutions-turbulent-times; Bryan K. Clontz, *Charitable Gift Annuity Reinsurance: The Top Ten Frequently Asked Questions* (Mar. 29, 2006), *available at* http://www.pgdc.com/pgdc/article/2006/03/charitable-gift-annuity-reinsurance-top-ten-frequently-asked-questions.
[41] *See* Priv. Ltr. Rul. 2008-52-037; Priv. Ltr. Rul. 2008-47-014.
[42] *In re: Brown*, 303 F.3d 1261 (11th Cir. 2002).
[43] By this, I mean a CRAT where the trust's annuity has been replaced by a commercial one.

Charitable lead trusts might reach a different result. These trusts typically flow to the donor's (or grantor's or settlor's) descendants after the lead annuity or unitrust payments to the charity cease. Because a charitable lead trust is created to benefit someone other than the donor, its spendthrift provision should be upheld as valid. Again, I regrettably cannot point to an applicable Florida case to illustrate. Until more cases and commentary develop, donors should approach with more caution.

A "twist" on the design of a charitable trust is the use of one of the DAPT jurisdictions, where self-settled spendthrift trusts are allowed.[44] One of the precious few articles that squarely discusses asset protection issues involved in charitable planning is the superb 2006 article co-authored by Richard W. ("Dick") Nenno,[45] a well-known author, speaker, and leader in the areas of estate, charitable, and asset protection planning. That article points out that several DAPT jurisdictions, including Alaska, Delaware, South Dakota, and Utah, specifically provide protection to a CRT, although only Delaware precludes a spouse's right to satisfy his or her elective share against that DAPT-based CRT.[46] The article also notes that an existing CRT may be moved to Delaware under that jurisdiction's DAPT statute.[47] Lastly, the article discusses eight hurdles that a creditor would face in pursuing a Delaware DAPT-based CRT, including the final hurdle in the bankruptcy context.[48]

Despite the article's excellent analysis and reasonable suggestions of a positive outcome, the donor must still be aware of the risks. Because the assets of the CRT would likely be held within the chosen DAPT jurisdiction, though, this "wrinkle" might work effectively. In any event, this approach would be preferable if a donor definitely wants to pursue a charitable trust and also has asset protection concerns.

E. "Wealth Replacement" Insurance Trusts and Charitable Remainder Trusts

Another twist that would take flight is the combination of an irrevocable life insurance trust (ILIT) with a charitable remainder trust (CRT). These ILITs are often called "wealth replacement trusts" because, as many of you know, the insurance proceeds of the ILIT replace the assets that flow to the charitable remainder beneficiaries when the CRT terminates. During the payout period, at least part of the annuity or unitrust payment is usually utilized to pay the insurance premium on the ILIT's policy. In this manner, the CRT funds the ILIT, although the entire payment from the CRT is rarely used for those premium payments and is therefore less likely to run afoul of the fraudulent transfer rules (discussed below).

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[44] *See, e.g.*, Lee S. McCullough, III & David R. York, *North to Alaska: A Summary of Recent Changes to Trust Law in Alaska*, Utah Bar Continuing Legal Education (Sept. 8, 1999) (under section "V"), *available at* http://www.utahbar.org/sites/estate/html/sep_8__99.html.

[45] Richard W. Nenno *et al.*, *Structuring CRTs as Delaware APTs to Provide Protection from Creditors and Surviving Spouses*, 31 Tax Mgmt. Est., Gifts & Tr. J. 71 (Mar. 9, 2006), available at http://martinconatylunger.com/CRT%20article.pdf. (Another article focusing on the case of *In re: Mack*, 269 B.R. 392 (Bankr. D. Minn. 2001) (also discussed in Mr. Nenno's article above), that no longer seems to be available was J. Michael Pusey, *Is Your Charitable Remainder Trust Creditor Proof? Lessons from Mack*, The Planned Giving Design Center, Gift Planner's Digest (May 23, 2002).)

[46] *See id.* at 73.

[47] *See id.* at 74.

[48] *See id.* at 75-87 (including remarks of the Honorable Paul G. Hyman, Jr., one of the judges of the United States Bankruptcy Court for the Southern District of Florida, made during an American Bar Association program).

Unlike self-settled trusts, ILITs are never structured to benefit the insured grantor (or settlor). Rather, ILITs traditionally benefit a spouse and/or descendants. If drafted appropriately, an ILIT closely resembles a discretionary spendthrift trust. These types of creative solutions can achieve a donor's charitable, estate, and asset protection planning goals in one fell swoop.

III. FOCUS ON FOUNDATIONS -- ASSET PROTECTION FROM CHARITY'S VIEW

We now turn to you all who lead or work as part of the team of a charity. As illustrated earlier (and as you all within the nonprofit arena know better than I do), you are probably exposed to the same degree of risks as any of your donors or their for-profit business entities. State law might help to protect your charity, but consideration of your own asset protection is likely a good idea.

A. Erosion of the Historical Protection of Charities from Creditors' Claims

We discussed earlier the deterioration of charitable immunity.[49] That trend will likely continue. Thus, you need to equip your charity with appropriate armor to shield your charity's assets from creditors' claims (not in any ill-spirited way, of course -- just like the donor discussion above in preparing for the unfortunate situation that is often beyond your control).

B. Protection Now Similar to For-Profit Entities

1. Outright Gifts Generally Not Reachable by Donor's Creditors

While protecting against your charity's own creditors must be addressed, at least those outright gifts are generally beyond the reach of your donor's creditors! These gifts are now protected to a greater degree. For example, the Religious Liberty and Charitable Donation Act of 1998[50] provides that charitable gifts up to fifteen percent of a donor's adjusted gross income are protected even against creditors of the donor's bankruptcy estate. (Let us hope that this "advantage" is seldom needed!)

2. Additional Ways to Protect Charity's Assets

Charities can actively protect their assets similar to the approaches of their donors. Separate entities and trusts might fit well in supporting the charity's mission yet also provide a high degree of protection from creditors' claims. Charities that have increased risk exposure, such as charitable organizations that deal with children, most charities associated with health care, and educational institutions that have athletic teams, should seriously consider asset protection planning, just as donors-clients who practice architecture, law, and medicine would do so.

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[49] *See also* Janet Fairchild, Annotation, *Tort Immunity of Nongovernmental Charities -- Modern Status*, 25 A.L.R.4th 517 (1983 & Cum. Supp. 2009).

[50] Religious Liberty and Charitable Donation Protection Act of 1998 (RLCDPA), Pub. L. No. 105-183, 112 Stat. 517.

C. Supporting Organization or Similar Entity to Protect Charity's Assets

One of the most fundamental uses of a supporting organization (SO) or similar entity is to protect the "supported" (or, figuratively, the "parent") organization's assets. A fundraising SO of a charity represents a classic example of this arrangement. By segregating the planned and other types of gifts in a fundraising SO, the original charity can position itself to minimize liability exposure.

For example, assume that the local Boys and Girls Club of America (BGCA) receives a substantial gift via a donor's estate plan. In this example, we will use $30 million. The local club has concerns that, should one of the children be injured or if some other accident were to occur on their property, a potential creditor might pursue this new gift. Consequently, the local BGCA board decides to create a Type I SO that is legally controlled by the local club's board and organized for fundraising and related purposes. Although a trial lawyer might attempt to "pierce" in effect the legally-distinct SO by arguing that the SO should be disregarded as a conduit or "alter ego" of the local BGCA club (the supported organization), proper maintenance and operation of the SO should succeed in segregating and insulating the $30 million gift.

For this type of entity, I would lean toward the use of a trust-based SO due to the enhanced privacy advantages and particularly the difficulty in trying to "pierce" it as described above. Many articles and treatises discuss the choice between a corporate- and a trust-based charity, including the specific application of SOs.[51] Alternatively, I have used a nonprofit corporation with a provision that allows conversion to a wholly charitable trust that includes an independent trustee or co-trustee; this can also be drafted as part of the charitable trust agreement from the outset with something of a "flee" or "flight" clause that automatically appoints one or more independent trustees in the event that a creditor threatens or files a claim.[52]

As a similar example, state colleges and universities may create a specific type of support organization that is not classified as an SO but functions similarly:

> **(iv)** an organization which normally receives a substantial part of its support … from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public, and which is *organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a college or university* which is an organization referred to in clause (ii) of this subparagraph and which is an agency or instrumentality of a State or political subdivision thereof, or which is owned or operated by a State or political subdivision thereof or by an agency or instrumentality of one or more States or political subdivisions…[53]

The University of Iowa Foundation is apparently organized in this manner (that is, as a "direct support" educational charity/foundation under I.R.C. § 170(b)(1)(A)(iv)):

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[51] *See, e.g.*, Evelyn Brody, *Charity Governance: What's Trust Law Got to Do with It?*, 80 CHI.-KENT L. REV. 641, 646-650 (2005) (excellent discussion of differences between trust-based charities and nonprofit corporations).
[52] I have actually obtained exempt status for several charities with these types of provisions included.
[53] I.R.C. § 170(b)(1)(A)(iv) (2010) (emphasis added).

> ***
>
> The University of Iowa Foundation exists solely for the [University of Iowa's (UI's)] benefit, serving as the channel preferred by the UI for private gifts to all areas of the University.
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> ***
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> The University of Iowa Foundation is the preferred channel for private gifts to all areas of the University. Though it is structurally separate from The University of Iowa, it exists solely for the UI's benefit. Gifts made through the UI Foundation directly support areas -- including the [University of Iowa Alumni Association] -- identified by the donor.[54]

Charities may employ these and similar types of charitable entities to protect their assets. In some cases, the charity might obtain additional benefits. These might include budgeting advantages (if the related/supporting charity is not required to be included in certain state filings, for example, of a state college or university) and in some cases reduced exposure to that undesirable unrelated business taxable income.[55] You might need to file an additional Form 990 with the Internal Revenue Service, but some of these advantages might make that extra task a pleasure!

1. *Donor's Use of Family Foundation or Private Operating Foundation Might Also Be Considered*

As a charity with numerous donors, you might explore coordination in planning a donor's own foundation. At least one well-known treatise mentions the concept of asset protection in connection with a family foundation.[56] Most resources focus on the use of international foundations to protect assets, which are generally not recognized by the Internal Revenue Service and are typically dissimilar to our charitable foundation concept.[57] Nevertheless, an American private foundation can afford a significant degree of asset protection both for the donor and for a charity that coordinates with the donor.

Most of you know that the two primary types of private foundations are the non-operating or grant-making (or "family") foundation and the operating foundation. The former is

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[54] "FAQ: How the Foundation works with the University," *available at* http://www.uifoundation.org/about/faq/work-with-university/. For an excellent overview, including a brief discussion of The University of Iowa Foundation, *see* David Bass, *The Foundation-Institution Partnership: The Role of Institutionally Related Foundations in Public Higher Education*, New Directions for Higher Educ. (2010) (Wiley Periodicals, Inc.) (search title via Google and select "Quick View" to read cached article in its entirety).

[55] *See, e.g.*, Christopher R. Hoyt & Pamela Segars, *Gifts From Subchapter S Corporations and Their Shareholders*, 2006 National Committee on Planned Giving Conference (October 13, 2006).

[56] JERRY J. MCCOY & KATHRYN W. MIREE, FAMILY FOUNDATION HANDBOOK § 2.02[B][7] (2009) ("[7] Possible Asset Protection: A family foundation may even provide a means by which a family can avoid losing control of assets…" (with an example of RLCDPA's application)).

[57] *See, e.g.*, ASSET PROTECTION STRATEGIES, *supra* n. 16, at ch. 22 ("The Civil Foundation" -- not necessarily even restricted to charitable purposes).

sometimes referenced as a "check-writing" foundation because many of them simply make their minimum distributions each year. One design option is to specify one or more charitable grantees to which the non-operating foundation may distribute. The latter, on the other hand, is an active charity that must engage in one or more charitable purposes in order to obtain its exempt status. Where appropriate, an existing charity and a donor could collaborate in a specific way to accomplish some charitable mission. For example, a donor and his or her family could create a private operating foundation to allow the entire family to build homes for impoverished families alongside an existing charity that cannot currently reach a remote geographic area.

Some of these concepts border on an SO. Indeed, that might be another option in coordination with a donor. Additional care is required in the wake of the Pension Protection Act (PPA),[58] particularly in terms of a Type III SO that previously enjoyed a more independent relationship between the SO and the supported charity.[59] Nonetheless, it is still possible to design a workable SO, albeit in many cases a Type I or Type II SO in the wake of the PPA.

2. *Advantageous Coordination of These Entities with Donor's Planning*

Other possibilities for coordinated planning might include the design of a charitable lead trust, discussed above, or something more elaborate that includes charitable trusts funding one or more endowments, perhaps with a collaborative foundation or SO for good measure. Opportunities abound. If donors and their beloved charities are willing to work together, they can accomplish much more than the good charitable work that will always bring them together. They can help to protect, preserve, and grow assets that will sooner or later serve even the charity's greater good.

D. Endowments: Are They Permanently Protected?

1. *Legal Effects of Truly-Permanent Endowment*

Before I begin using frightening words such as "fraudulent," a word on endowment funds is probably in order. As most of you know, a fund designated for a specific charitable purpose and/or with a specific set of distribution and timing requirements is known as an endowment. A donor must clearly impose these restrictions in order for a fund to be classified as a permanent endowment. The official website of the Uniform Prudent Management of Institutional Funds Act (UPMIFA) (http://www.upmifa.org) contains excellent resources that explain these concepts much more eloquently and comprehensively.

2. *Changes Introduced by Uniform Management of Institutional Funds Act (UMIFA) (1972) and Uniform Prudent Management of Institutional Funds Act (2006)*

The vast majority of states have enacted the revised version of this model act, known as UPMIFA, which provides more flexibility, especially in the area of spending restrictions.

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[58] The Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780-1172.
[59] *See generally* the Council on Foundations' "What Is a Supporting Organization?," available at http://classic.cof.org/Action/content.cfm?ItemNumber=8944.

UMIFA, which is still the law in Florida as of September 2010, contains a pesky concept known as "historic dollar value." If a charity wants to invade an endowment's principal, it must satisfy the historic dollar value calculations under UMIFA. The revised act changes that rigid standard in favor of a more flexible list of factors, with the ultimate goal of "prudent" decisions.

3. Creditors' Ability to Reach Endowment Funds

If an endowment fund is truly restricted by the donor and not simply by the board (known as a "quasi-endowment" or temporarily-restricted funds), creditors generally cannot reach the endowment despite the fact that it does not constitute a trust:

> Nonetheless, an endowment created by a charity which solicited donors by representing the fund as a permanent fund for specific purposes may be deemed equivalent to a charitable trust and not subject to creditors' claims. Donor intent, in short, trumps creditors' claims where the fund is restricted for a particular purpose.[60]

The legal analysis and theory tracks the concept of a spendthrift trust in that board-designated funds are "self-settled" and revocable, whereas a fund created by a donor for a specific purpose generally to benefit third parties (not the charity itself) is and should be protected.[61]

IV. THE DREADED "F" WORD OF ASSET PROTECTION: FRAUDULENT TRANSFERS

A. General Discussion of Fraudulent Transfers

Florida enacted its own version of the Uniform Fraudulent Transfer Act.[62] Essentially, fraudulent transfer laws seek to "undo" transfers that were either made (a) with actual intent to "hinder, delay, or defraud" creditors or (b) with constructive intent to do the same. The latter is determined based on multiple factors, the threshold and most important of which is the receipt of "less than full and adequate consideration" as we would describe in estate and tax planning parlance. In summary, you cannot intentionally defraud your creditors, nor may you make deemed gifts that would render you (i) unable to continue in your business or (ii) insolvent.

If a creditor successfully argues to the court that a fraudulent transfer has occurred, the creditor may avoid (or "undo") the transfer, pursue attachment of the transferred property or other property of the debtor, or seek other remedies such as an injunction or appointment of a receiver.[63] The court may use its equitable powers to fashion other remedies.[64] Nonetheless,

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[60] Christina M. Mason & Carolyn R. Caufield, *Charities in Distress: Governance and Standards in Troubled Times* (Mar. 19, 2010), *available at* http://onphilanthropy.com/2010/charities-in-distress-governance-and-standards-of-care-in-troubled-times/.
[61] *See id. See generally* J. Patrick Whaley *et al.*, *Dealing with Problems of Financially Distressed Exempt Organizations*, *available at* http://www.sdlaw.com/files/Download/Dealing%20with%20Problems%20of%20Financially%20Distressed%20Exempt%20Organizations.pdf.
[62] FLA. STAT. ch. 726. (2010).
[63] *Id.* at § 726.108.
[64] *Id.*

Florida courts are generally reluctant to apply the Sunshine State's fraudulent transfer rules unless they clearly apply, unlike other states, where such rules are applied more liberally.[65]

B. Exceptions to Fraudulent Transfer Rules

If, after a transfer occurs, the debtor were still solvent, the creditor would have a difficult time establishing that the transfer was fraudulent.[66] Thus, timing and the degree of a donor's solvency are extremely important. In addition, the fraudulent transfer rules are not violated if (1) the debtor receives from an unrelated party full consideration in exchange for the asset transferred[67] or (2) the asset is exempt from creditors' claims.[68] Stated differently, only assets reachable by creditors are subject to these rules.

You may implement the planning techniques above (which, again, is not an exhaustive list), yet still comply with the fraudulent transfer rules. Doing so is definitely easier in Florida since many assets are exempt by default. Even if assets are not exempt, you may structure planning that protects assets, as a donor or as a charity, and cannot be "undone" by a creditor -- with sooner always being better (and years ahead of any difficulties being ideal)!

C. Fraudulent Conversion Rules

Rather than a transfer, a fraudulent conversion involves the conversion of a non-exempt asset to an exempt category. The analysis of whether a conversion rises to the fraudulent level follows the fraudulent transfer statute above.[69] The primary difference is that the asset remains a part of your portfolio, either directly or within an entity or trust structure, instead of being transferred away from you to someone or something else.

V. CONCLUSION

The world has changed in some startling ways during the past several years, but donors and charities may take legal steps to protect and preserve their assets. The analysis as to what techniques to employ will vary, sometimes dramatically, from one case to another. These planning cases are intensely fact-specific, and often draw on existing planning and structures to achieve multiple goals.

These days, donors and charities are keenly aware of the changes that can occur to make protection of their assets critically important. We currently receive half a dozen or more calls some days inquiring about asset protection planning. Ten or twenty years from now, some of you might have forgotten about these troubled times. For this and other reasons, you should consider protecting assets now, when the financial "sky" is not falling or an injured person is not

[65] *See, e.g.*, Denis Kleinfeld & Jonathan Alper, *The Florida Supreme Court Finds No Liability for Aiding or Abetting a Fraudulent Transfer*, 78 Fla. Bar. J. 22 (June 2004) (discussing *Freeman v. First Union Nat'l. Bank*, 329 F.3d 1231 (11 Cir. 2003) (per curiam)), *available at* http://www.entrepreneur.com/tradejournals/article/115048856.html.
[66] *See* FLA. STAT. § 726.103 (2010).
[67] *See id.* at § 726.104 (2010).
[68] *Id.* at § 726.102(2) (2010) (defining "asset" and excluding exempt assets and TBE property if not a joint creditor as to the latter).
[69] *Id.* at § 222.30 (2010).

pursuing you via a persistent personal injury lawyer. The advanced estate planning topics of asset protection and charitable planning are not extremely important … until you need them!

It is almost never too late to consider these planning issues. Unfortunately, if asset protection planning is deferred until "late in the game," options become much more limited, exactly like they do in the routine estate planning context -- including situations where a donor wants to pursue charitable planning -- when someone's health is failing quickly. For this reason alone, donors should implement an integrated estate, charitable, and asset protection plan when the "sky is blue."

The same reasoning applies to charities, which are frequently exposed to more risk anyway. The historical protection of charities from tort and related liabilities has faded in most jurisdictions. Consequently, charities need to protect their assets as immediately as their for-profit cousins.

I would never recommend pursuing asset protection planning to any donor or charity solely for the sake of protecting one or more assets. In most cases, however, protection is merely one of a series of goals. Other charitable and estate planning factors are commonly involved, as well as business and/or other tax planning issues. Moreover, as with any estate and tax planning, utilizing more advanced techniques such as charitable planning and/or asset protection should be considered as early as possible. Ben Franklin's fire-fighting advice applies precisely to the intersection of charitable and asset protection planning: "An ounce of prevention is worth a pound of cure."